

whether H-1B nonimmigrants are actually employed, unless the application is superseded by a subsequent application which is certified by ETA.

(5) Only for the purpose of assuring the labor standards protections afforded under the H-1B program, where an employer files a petition with DHS under the H-1B classification pursuant to a certified LCA that had been withdrawn by the employer, such petition filing binds the employer to all obligations under the withdrawn LCA immediately upon receipt of such petition by DHS.

(c) *Invalidation or suspension of a labor condition application.* (1) Invalidation of a labor condition application shall result from enforcement action(s) by the Administrator, Wage and Hour Division, under subpart I of this part—e.g., a final determination finding the employer's failure to meet the application's condition regarding strike or lockout; or the employer's willful failure to meet the wage and working conditions provisions of the application; or the employer's substantial failure to meet the notice of specification requirements of the application; see §§ 655.734 and 655.760 of this part; or the misrepresentation of a material fact in an application. Upon notice by the Administrator of the employer's disqualification, ETA shall invalidate the application and notify the employer, or the employer's authorized agent or representative. ETA shall notify the employer in writing of the reason(s) that the application is invalidated. When a labor condition application is invalidated, such action shall be the final decision of the Secretary.

(2) Suspension of a labor condition application may result from a discovery by ETA that it made an error in certifying the application because such application is incomplete, contains one or more obvious inaccuracies, or has not been signed. In such event, ETA shall immediately notify DHS and the employer. When an application is suspended, the employer may immediately submit to the certifying officer a corrected or completed application. If ETA does not receive a corrected application within 30 days of the suspension, or if the employer was disqualified by the Administrator, the application

shall be immediately invalidated as described in paragraph (c) of this section.

(3) An employer shall comply with the "required wages rate" and "prevailing working conditions" statements of its labor condition application required under §§ 655.731 and 655.732 of this part, respectively, even if such application is suspended or invalidated, at any time H-1B nonimmigrants are employed pursuant to the application, unless the application is superseded by a subsequent application which is certified by ETA.

(4) An employer's obligation to comply with the "no strike or lockout" and "notice" statements of its labor condition application (required under §§ 655.733 and 655.734 of this part, respectively), shall remain in effect and the employer shall remain subject to investigation and sanctions for misrepresentation on these statements even if such application is suspended or invalidated, regardless of whether H-1B nonimmigrants are actually employed, unless the application is superseded by a subsequent application which is certified by ETA.

(d) *Employers subject to disqualification.* No labor condition application shall be certified for an employer which has been found to be disqualified from participation, in the H-1B program as determined in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart I of this part.

[59 FR 65659, 65676, Dec. 20, 1994, as amended at 65 FR 80232, Dec. 20, 2000; 66 FR 63302, Dec. 5, 2001; 70 FR 72563, Dec. 5, 2005; 73 FR 19949, Apr. 11, 2008]

**§ 655.760 What records are to be made available to the public, and what records are to be retained?**

Paragraphs (a)(1) thru (a)(6) and paragraphs (b) and (c) of this section also apply to the H-1B1 and E-3 visa categories.

(a) *Public examination.* The employer shall make a filed labor condition application and necessary supporting documentation available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the labor condition application is filed

with DOL. The following documentation shall be necessary:

(1) A copy of the certified labor condition application (Form ETA 9035E or Form ETA 9035) and cover pages (Form ETA 9035CP). If the Form ETA 9035E is submitted electronically, a printout of the certified application shall be signed by the employer and maintained in its files and included in the public examination file.

(2) Documentation which provides the wage rate to be paid the H-1B nonimmigrant;

(3) A full, clear explanation of the system that the employer used to set the “actual wage” the employer has paid or will pay workers in the occupation for which the H-1B nonimmigrant is sought, including any periodic increases which the system may provide—e.g., memorandum summarizing the system or a copy of the employer’s pay system or scale (payroll records are not required, although they shall be made available to the Department in an enforcement action).

(4) A copy of the documentation the employer used to establish the “prevailing wage” for the occupation for which the H-1B nonimmigrant is sought (a general description of the source and methodology is all that is required to be made available for public examination; the underlying individual wage data relied upon to determine the prevailing wage is not a public record, although it shall be made available to the Department in an enforcement action); and

(5) A copy of the document(s) with which the employer has satisfied the union/employee notification requirements of § 655.734 of this part.

(6) A summary of the benefits offered to U.S. workers in the same occupational classifications as H-1B nonimmigrants, a statement as to how any differentiation in benefits is made where not all employees are offered or receive the same benefits (such summary need not include proprietary information such as the costs of the benefits to the employer, or the details of stock options or incentive distributions), and/or, where applicable, a statement that some/all H-1B nonimmigrants are receiving “home country” benefits (see § 655.731(c)(3));

(7) Where the employer undergoes a change in corporate structure, a sworn statement by a responsible official of the new employing entity that it accepts all obligations, liabilities and undertakings under the LCAs filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification, and a description of the actual wage system and FEIN of the new employing entity (see § 655.730(e)(1)).

(8) Where the employer utilizes the definition of “single employer” in the IRC, a list of any entities included as part of the single employer in making the determination as to its H-1B-dependency status (see § 655.736(d)(7));

(9) Where the employer is H-1B-dependent and/or a willful violator, and indicates on the LCA(s) that only “exempt” H-1B nonimmigrants will be employed, a list of such “exempt” H-1B nonimmigrants (see § 655.737(e)(1));

(10) Where the employer is H-1B-dependent or a willful violator, a summary of the recruitment methods used and the time frames of recruitment of U.S. workers (or copies of pertinent documents showing this information) (see § 655.739(i)(4)).

(b) *National lists of applications and attestations.* ETA shall compile and maintain on a current basis a list of the labor condition applications filed under INA section 212(n) regarding H-1B nonimmigrants and a list of labor attestations filed under INA section 212(t) regarding H-1B1 nonimmigrants. Each list shall be by employer, showing the occupational classification, wage rate(s), number of nonimmigrants sought, period(s) of intended employment, and date(s) of need for each employer’s application. The list shall be available for public examination at the Office of Foreign Labor Certification, Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210.

(c) *Retention of records.* Either at the employer’s principal place of business in the U.S. or at the place of employment, the employer shall retain copies of the records required by this subpart for a period of one year beyond the last date on which any H-1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants

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were employed under the labor condition application, one year from the date the labor condition application expired or was withdrawn. Required payroll records for the H-1B employees and other employees in the occupational classification shall be retained at the employer's principal place of business in the U.S. or at the place of employment for a period of three years from the date(s) of the creation of the record(s), except that if an enforcement action is commenced, all payroll records shall be retained until the enforcement proceeding is completed through the procedures set forth in subpart I of this part.

(Approved by the Office of Management and Budget under control number 1205-0310)

[59 FR 65659, 65676, Dec. 20, 1994, as amended at 60 FR 4029, Jan. 19, 1995; 65 FR 80232, Dec. 20, 2000; 66 FR 63302, Dec. 5, 2001; 69 FR 68228, Nov. 23, 2004; 70 FR 72563, Dec. 5, 2005; 71 FR 35521, June 21, 2006; 73 FR 19950, Apr. 11, 2008]

### **Subpart I—Enforcement of H-1B Labor Condition Applications and H-1B1 and E-3 Labor Attestations**

SOURCE: 59 FR 65672, 65676, Dec. 20, 1994, unless otherwise noted.

#### **§ 655.800 Who will enforce the LCAs and how will they be enforced?**

(a) *Authority of Administrator.* Except as provided in § 655.807, the Administrator shall perform all the Secretary's investigative and enforcement functions under sections 212(n) and (t) of the INA (8 U.S.C. 1182(n) and (t)) and this subpart I and subpart H of this part.

(b) *Conduct of investigations.* The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of the investigation.

(c) *Employer cooperation/availability of records.* An employer shall at all times

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cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of sections 212(n) or (t) of the INA and/or this subpart I or subpart H of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(n) or (t) or this subpart I or subpart H of this part. Any such interference shall be a violation of the labor condition application and this subpart I and subpart H of this part, and the Administrator may take such further actions as the Administrator considers appropriate. (Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Confidentiality.* The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under this subpart I or subpart H of this part.

[65 FR 80233, Dec. 20, 2000, as amended at 69 FR 68228, Nov. 23, 2004]

#### **§ 655.801 What protection do employees have from retaliation?**

(a) No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has—

(1) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t), including this subpart I and subpart H of this part and any pertinent regulations of DHS or the Department of Justice; or

(2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance